

# ZENTRALER KREDITAUSSCHUSS

MEMBERS: BUNDESVERBAND DER DEUTSCHEN VOLKSBANKEN UND RAIFFEISENBANKEN E.V. BERLIN • BUNDESVERBAND DEUTSCHER BANKEN E. V. BERLIN • BUNDESVERBAND ÖFFENTLICHER BANKEN DEUTSCHLANDS E. V. BERLIN • DEUTSCHER SPARKASSEN- UND GIROVERBANDE. V. BERLIN-BONN • VERBAND DEUTSCHER HYPOTHEKENBANKEN E. V. BERLIN

**Response of the  
Zentraler Kreditausschuss<sup>1</sup>  
to CESR's Call for Opinions on the  
Draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC  
on Markets in Financial Instruments**

**Professional Client Agreement**

**Ref.: CESR/04-689**

18 February 2005

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<sup>1</sup> The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR)*, for the cooperative banks, the *Bundesverband deutscher Banken (BdB)*, for the private commercial banks, the *Bundesverband Öffentlicher Banken Deutschlands (VÖB)*, for the public-sector banks, the *Deutscher Sparkassen- und Giroverband (DSGV)*, for the savings banks financial group, and the *Verband deutscher Hypothekenbanken (VdH)*, for the mortgage banks. Collectively, they represent more than 2,300 banks.

## I. General remarks

### - *Level of protection needed by professional clients*

In its Call for Opinions CESR touches upon the issue that professional clients need less protection than retail clients. We expressly support this view and feel that this fact can only be acknowledged adequately by dispensing with level 2 measures for professional clients under Article 19.7 of the MiFID. Professional clients are usually entities which possess much more investment experience, knowledge and expertise than retail clients. They also have an interest in being able to react flexibly and in not being prevented from doing so by rigid rules. Any over-regulation would, therefore, simply lead to more bureaucracy and thus make business with professional clients more expensive, while failing to take due account of the professionalism and needs of these market participants.

### - *Requirement of written form*

Neither Article 19.7 of the MiFID nor the mandate given by the Commission contain any authorisation to introduce rules stipulating that agreements are only valid if they are made in writing; nor is it envisaged that CESR may specify the content of written agreements.

### - *Support for option 1*

We favour the first of the options under consideration by CESR, stating that no advice on level 2 measures should be provided. Instead, how agreements are entered into and what they contain should be left explicitly to market participants. Retention of this tried and tested practice in the future would also have the advantage that existing agreements would not need to be modified.

### - *Holding of client assets*

We share CESR's view that no further advice should be provided on the holding of client assets.

## II. Replies to questions

**Question 1:** *Should a written client agreement be necessary for professional clients of an investment firm?*

**Answer:** As far as portfolio management is concerned, we share CESR's view that any advice on the mode of acceptance or content of agreements would be over-prescriptive and unjustified in a professional client relationship. At the same time, we also believe that the question of whether a written agreement must be entered into cannot be dealt with by level 2 measures either. The fears

expressed by CESR that silence on this question at level 2 could lead to different interpretation of Article 19.7 in the Member States could be dispelled by wording making clear that there is no requirement for agreements to be in writing.

CESR also states that it sees no compelling need for written agreements for the provision of investment advice. We feel it would be appropriate to dispense with any level 2 measures in this area too. Thanks to their status, professional clients are able to properly assess the implications of investment transactions. There is no need for a written agreement to draw their attention to the consequences of their investment activity. Moreover, CESR rightly points out that the introduction of mandatory written agreements for the provision of investment advice could result in unnecessary delays in the commencement of services. Ultimately, any requirement for agreements to be in writing would simply lead to more bureaucracy.

**Question 2:** *If so, should the agreement be limited to certain investment services (portfolio management and investment advice) or should it be requested for other investment and ancillary services?*

**Answer:** We reject any requirement for agreements to be in writing (see answer to question 1).

**Question 3:** *If such a requirement is introduced, do you think that this would create additional costs? Please provide details of the nature and likely amount of these costs.*

**Answer:** Although it is a fact that in portfolio management an investment firm and a client usually enter into a written agreement, they do so on a voluntary basis and the content of the agreement is entirely up to them. This approach has proved successful to date, so that regulation is neither necessary nor helpful.

Regulation would, in fact, create additional costs, as standard agreements would have to be modified accordingly. It could also be the case that special items which would not actually be needed in individual cases would have to be incorporated into agreements. This would make the provision of investment advice more complicated and hamper the sensitive business of portfolio management.

We categorically reject mandatory written agreements for the provision of investment advice. Such agreements do not exist at present, as the specific content and scope of the requirements governing the provision of investment advice to professional clients in particular cannot generally

be fixed in advance but only on a case-by-case basis (depending on the information obtained from the client and the recommended product). A record that investment advice was provided is established internally. On the basis of this record and both the details supplied by clients and the information provided to them within the scope of investment advisory services, supervisors can then audit compliance of investment firms with the relevant requirements. This arrangement fully meets the purpose of Article 19.7 of the MiFID. The introduction of mandatory written agreements for the provision of investment advice would, on the other hand, make the provision of such advice much more expensive and result in delays in entering into agreements, as the requirements applying in dealings with professional clients can only be set on a case-by-case basis. Whether clients, particularly professional clients, would be willing to bear the additional costs and accept delays, appears questionable. The consequence would be that advisory services would no longer be used by clients or no longer provided by investment firms due to insufficient demand.

**Question 4:** *If you consider that no such requirements should be introduced, please specify the reasons why.*

**Answer:** Professional clients are usually entities which have much more investment experience, knowledge and expertise than retail clients. Any over-regulation would therefore simply lead to more bureaucracy and make business with professional clients more expensive. Instead, how agreements are entered into and what they contain should be left explicitly to market participants. Retention of this tried and tested practice in the future would also have the advantage that existing agreements would not need to be modified.